

the obligation of the injured party to take actions to mitigate the harm he will suffer from the breach so as to mitigate the damages he will claim under article 41 (1) (b) or 57 (1) (b). "If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated."

3. The sanction provided by article 73 against a party who fails to mitigate his loss only enables the other party to claim a reduction in the damages. It does not affect a claim for the price by the seller pursuant to article 58 or a reduction in the price by the buyer pursuant to article 46.²

4. The duty to mitigate applies to an anticipatory breach of contract under article 63 as well as to a breach in respect of an obligation the performance of which is currently due. If it is clear that one party will commit a fundamental breach of the contract, the other party cannot await the contract date of performance before he declares the contract avoided and takes measures to reduce the loss arising out of the breach by making a cover purchase, reselling the goods or otherwise. The use of the procedure set forth in article 62, if applicable, would be a reasonable measure even though it may delay the avoidance of the contract and the cover purchase, resale of the goods or otherwise, beyond the date on which such actions would otherwise have been required.

Example 73 A: The contract provided that Seller was to deliver 100 machine tools by 1 December at a total price of \$ 50,000. On 1 July he wrote Buyer and said that because of the rise in prices which would certainly continue for the rest of the year, he would not deliver the tools unless Buyer agreed to pay \$ 60,000. Buyer replied that he would insist that Seller deliver the tools at the contract price of \$ 50,000. On 1 July and for a reasonable time thereafter, the price at which Buyer could have contracted with a different seller for delivery on 1 December was \$ 56,000. On 1 December Buyer made a cover purchase for \$ 61,000 for delivery on 1 March. Because of the delay in receiving the tools, Buyer suffered additional losses of \$ 3,000.

In this example Buyer is limited to recovering \$ 6,000 in damages, the extent of the losses he would have suffered if he had made the cover purchase on 1 July or a reasonable time thereafter, rather than \$ 14,000, the total amount of losses which he suffered by awaiting 1 December to make the cover purchase.

Example 73 B: Promptly after receiving Seller's letter of 1 July, in example 73 A, pursuant to article 62 Buyer made demand on Seller for adequate assurances that he would perform the contract as specified on 1 December. Seller failed to furnish the assurances within the reasonable period of time specified by Buyer. Buyer promptly made a cover purchase at the currently prevailing price of \$ 57,000. In this case Buyer can recover \$ 7,000 in damages rather than \$ 6,000 as in example 73 A.

Article 73

[Mitigation of damages]

The party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated.

PRIOR UNIFORM LAW

ULIS, article 88.

Commentary

1. Article 73 requires a party who relies on a breach of contract to adopt such measures as may be reasonable in the circumstances to mitigate the loss, including the loss of profit, resulting from the breach.

2. Article 73 is one of several articles which states a duty owed by the injured party to the party in breach.¹ In this case the duty owed is

¹ Under articles 74 to 77 the party in possession of goods has a duty under certain circumstances to preserve these goods and to sell them for

the benefit of the party who has breached the contract, even though the risk of loss is on the party in breach.

² Article 46 contains a principle of mitigation in that the buyer is not permitted to reduce the price if he does not permit the seller to remedy any failure on his part in respect of any of his obligations under the contract.